

Gautam (Migration) [2018] AATA 1599 (16 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Gautam
CASE NUMBER:	1723468
DIBP REFERENCE(S):	BCC2015/629590
MEMBER:	Wendy Banfield
DATE:	16 April 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 16 April 2018 at 11:27pm

CATCHWORDS

Migration – Federal Circuit Court remittal - Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether compelling reasons exist for waiving Schedule 3 criteria – Lack of spousal relationship – Significant time spent out of contact – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 65, 359A, 375A

Migration Regulations 1994 (Cth), Schedule 2, cl 820.211(2)(d)(ii)

CASES

MZYPZ v MIAC [2012] FCA 478

Babicci v MIMIA (2005) 141 FCR 285

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 9 May 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 26 February 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) because the applicant did not meet the requirements of Schedule 3 of the Migration Regulations and no compelling reasons existed.

4. *Background*

5. The applicant is a citizen of India who came to Australia in 2007 as a student. He met the sponsor in 2012 and they married April that year. At the time of the visa application which is the subject of this review, the applicant claimed he and the sponsor were in a genuine relationship and that he has a step-son.
6. According to the Department's decision record dated 9 May 2016 provided in evidence, the applicant's immigration history is as follows. In March 2010 the applicant applied for a Subclass 485 visa which he later withdrew. Also in 2010 the applicant applied for a Subclass 885 visa which was also withdrawn. Both of these applications were withdrawn after the Department asked him to comment on adverse information. In February 2013 the applicant applied for a Subclass 457 visa which was refused as the immigration delegate considered the nominated occupation was not genuine.
7. The matter is before the Tribunal because on 27 September 2017 the Federal Circuit Court ordered it to be remitted to the Tribunal.
8. The applicant appeared before the Tribunal on 30 January 2018 to give evidence and present arguments.

9. *Evidence of the visa applicant*

10. The Tribunal first discussed with the applicant the matter of the s.375A Certificate issued by the Department in relation to the non-disclosure of information in the applicant's case. Disclosure of the material on the Departmental file covered by the certificate was determined to be contrary to the public interest. The Tribunal advised the applicant that it considered the Certificate to be valid and invited him to make submissions. The applicant was given a copy of the Certificate during the hearing.
11. The information covered by the Certificate relates to internal Department procedures. The applicant was invited to comment or request time to consider the certificate and submit comments. The applicant said he wanted time to consider it and was given two weeks to provide any submissions. The applicant was advised the Tribunal had decided not to place any weight on the Certificate or the information it related to. As of the date of decision, the

applicant has not provided a response to the invitation to comment and as he was advised, the Tribunal does not rely on the material covered by the s.375 Certificate in its decision.

12. The applicant was invited to make any further submissions about his case. He said Ms Kamara the sponsor could not contribute to the hearing because of a certain situation between them. The Tribunal asked if it was his submission he was still in a relationship with his sponsor and he said they are 'in dispute'. He went on to outline issues he had with meeting the sponsor after the last hearing as well as problems with their joint bank account. The applicant claimed this was the reason his wife had not turned up for the hearing. The Tribunal put it to him that he had sent an email dated 24 February 2017 stating he and the sponsor were no longer in a relationship; he was shown a copy and agreed he had said 'nowadays' he was not in a relationship with her.
13. He was asked whether the relationship had resumed and he said it had. However, the applicant continued with his story about his bank account and a large sum of money that he claimed had been deposited into it, around \$50,000. He said the bank told him it was stolen money and wanted evidence about where it came from. The applicant surmised the sponsor wanted to get him into trouble. The Tribunal then queried what the applicant's evidence about a bank account had to do with whether he and the sponsor were in a genuine and continuing spouse relationship. The applicant seemed to be saying the sponsor was threatening him by depositing a large sum of money into his bank account which would lead to him being investigated.
14. The Tribunal asked the applicant again to explain the point he was trying to make and he said that even though he had supported the sponsor, she went against him. The applicant said the sponsor had wanted him to be a father to her children and he had supported her while she did not have a job. The Tribunal put to the applicant that on the evidence available, including his email of 24 February 2017, it did not appear he and the sponsor were currently in a relationship. The applicant replied that if the sponsor wanted, she could seek separation or divorce but for his part, he had tried his best to keep it going. He claimed he wanted to continue the relationship because he had gone against his parents in marrying the sponsor.
15. The Tribunal asked the applicant about the information that was put to him under s.359A of the Migration Act at a previous Tribunal hearing where the sponsor had advised she was no longer in contact with the applicant and had married someone else. The applicant asked if the sponsor had provided evidence of this and declared he had a certificate of marriage. He denied he and the sponsor were divorced as she had said when contacted by the Tribunal.
16. The applicant said sometimes people separate but he has never been contacted in relation to a divorce. The Tribunal reminded the applicant that the sponsor had not attended the hearing nor provided any written statement to support his claim of an ongoing relationship. He repeated that he had tried his best but conceded he was not living with the sponsor. He said that at the time of application they were in a relationship and he was relying on that evidence but he also said the circumstances had changed. The Tribunal advised the applicant that a relationship required mutual commitment and he did not appear able to demonstrate that. He agreed that now he cannot show a mutual commitment because of "the changing situation all the time". Regarding the sponsor's alleged vindictive behaviour; the applicant said perhaps the sponsor has been brain washed. The Tribunal asked the applicant why the sponsor had never attended a Tribunal hearing and he said he did not know why. He went on to speculate it may be because he had not been granted a visa.
17. The applicant referred the Tribunal to documents that had been submitted previously to the Department. The applicant confirmed his address and said he believed the sponsor was living with her mother. He was asked when he last had contact with the sponsor and he said it was after the previous Tribunal hearing in February 2017. He said he had not told the

sponsor about the hearing this time because he has not been able to contact her and she will not answer anything.

18. The applicant was asked if he had any further submissions. He said his parents in India are followers of a particular religious saint and have been subjected to threats and pressure. He claimed this was "affecting everywhere" and his father has had to go overseas twice as a result. It was claimed there is a lot of violence at home because there are very few followers of the sect in his state. The applicant said he was telling the Tribunal this because he wanted to provide information about his family. He said he did not have much financial help either and he has to pay off his and the sponsor's credit cards. The applicant claimed this is because the sponsor does not have a job and he has to help her and her mother.
19. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in the present case is whether the applicant meets the requirements of Schedule 3 of the Migration Regulation.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

21. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
22. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

23. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
24. Departmental records indicate the applicant's last substantive visa ceased on 8 April 2010 and the application for a partner visa which is the subject of this review was not made until 26 February 2015.
25. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

26. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
27. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria:

MZYPZ v MIAC [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

28. The applicant was invited to make submissions in his case, including the status of the spouse relationship between himself and his sponsor. The applicant claimed he and the sponsor were 'in dispute' and told the Tribunal about events to do with a joint bank account. The Tribunal considers the applicant's narrative about problems with a sum of money in a bank account did not provide support for his claims of an ongoing relationship. In giving this digressive narrative, the applicant was clearly seeking to avoid any direct discussion about the relationship between himself and the sponsor.
29. The applicant agreed he had said in an email to the Tribunal dated 24 February 2017 that he was not in a relationship with the sponsor "nowadays". At the hearing on 30 January 2018 the applicant said he had not seen the sponsor since the previous Tribunal hearing on 9 February 2017. He claimed a number of times that he had supported the sponsor and had tried his best. The applicant denied he and the sponsor were divorced and although he sometimes said they were separated and not living together, he continued to maintain that there was an ongoing relationship.
30. Regarding the sponsor's failure to attend the hearing or provide any evidence in support of a genuine relationship, the applicant said he had not been able to contact her. He believed she was living with her mother while he resides at a different address. The applicant agreed that he was unable to demonstrate a mutual commitment to a spouse relationship which he put down to a changing situation between them.
31. The Tribunal considered the evidence individually and cumulatively including the evidence provided at the time of application to the Department and to the Tribunal. In his oral evidence, the applicant conceded he is not living with the sponsor, he was unable to contact her regarding the hearing on 30 January 2018, they have had little communication since the first Tribunal hearing on 9 February 2017 and their only contact has been in relation to a dispute concerning a large sum of money in a bank account. The applicant was unable to demonstrate that he and the sponsor have a mutual commitment to a shared life to the exclusion of all others, or that they are in a genuine and continuing relationship.
32. For these reasons, the Tribunal is not satisfied the applicant and sponsor are in a long term spouse relationship that may amount to a compelling reason for waiving the Schedule 3 criteria. The Tribunal does not rely on information provided by the sponsor on 9 February 2017 that she and the applicant are divorced in making this finding. The Tribunal has relied on the applicant having been unable to demonstrate a long term spouse relationship at the time of decision.
33. In his evidence the applicant also claimed that his family in India face persecution because of belief in a certain religious figure, that violence occurs as a result and his father has had to depart overseas on occasion. The applicant did not refer to any threat or apprehension of harm to himself but told the Tribunal it was information he wanted to provide about his family. The Tribunal found the applicant's evidence on this point to be vague and unsupported by independent evidence. It is not considered to be sufficiently powerful to lead the Tribunal to make a positive finding in favour of waiving the Schedule 3 criteria in the applicant's case.
34. The other submission the applicant made was a general claim that he is without any financial help and has to pay off his and the sponsor's credit cards. The Tribunal does not consider this to be a reason not to apply the Schedule 3 criteria.

35. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
36. There is no evidence the applicant meets the alternative criteria in cl.820.211.
37. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

38. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Wendy Banfield
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.